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No. 02-504

# In the Supreme Court of the United States

BROCKTON HOSPITAL, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner, an acute care hospital, committed unfair labor practices by prohibiting its nurses from distributing literature to co-workers in the bargaining unit and by maintaining an overbroad policy prohibiting solicitation of employees and distribution of literature.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B13) is reported at 294 F.3d 100. The decision and order of the National Labor Relations Board (Pet. App. A1-A14, A45-A50) and the decision of the administrative law judge (Pet. App. A15-A45, A50-A51) are reported at 333 N.L.R.B. No. 165.

## JURISDICTION

The judgment of the court of appeals was entered on June 28, 2002. The petition for a writ of certiorari was filed on September 25, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 7 of the National Labor Relations Act (Act), 29 U.S.C. 157, guarantees employees the right "[to] join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 "necessarily encompasses" the right of employees "effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 491 (1978). Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce" employees in the exercise of Section 7 rights.

This Court has upheld the National Labor Relations Board's "general approach" to the regulation of employee solicitation and distribution of literature in health-care facilities. *Beth Israel Hosp.*, 437 U.S. at 507; *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 778-779 (1979). Under that general approach, a health care facility must permit employee solicitation and literature distribution during nonworking time in nonworking areas of a health-care facility unless the facility justifies a prohibition as necessary to avoid disruption of health-care operations or disturbance of patients. *Beth Israel Hosp.*, 437 U.S. at 507. The Board presumes, however, that a ban on distribution and solicitation in "immediate patient care areas" and a ban on distribution in work areas is justified. See *Baptist Hosp.*, 442 U.S. at 778-779; Pet. App. A5, A25-A26.

2. Petitioner is an acute care hospital in Brockton, Massachusetts. Pet. App. A16-A17, B2. Petitioner's registered nurses are represented by the Massachusetts Nurses Association (Union) for purposes of collec-

tive bargaining. *Id.* at A17, B2. A labor agreement between petitioner and the Union was set to expire on October 18, 1997. *Id.* at A17. In March 1997, the Union initiated a "safe care campaign" in order to prepare the nurses for upcoming contract negotiations and to educate them about adverse trends in the nursing profession—matters which the Union anticipated would be a subject of bargaining with petitioner. The Union's campaign included the distribution of literature by some of petitioner's nurses at the hospital. *Id.* at A17-A20, B2-B3.

The nurses, while off duty, distributed literature to other nurses in the bargaining unit as they entered and exited the hospital during shift changes. Pet. App. A19, B3. The distribution took place at three locations: in the vestibule at the front entrance, outside the rear entrance, and outside the emergency/outpatient entrance. *Id.* at A23, B3. The literature was offered only to bargaining-unit nurses and was not offered to patients, family members of patients, friends of patients, or visitors. *Id.* at A19, B3. The distribution occurred only one day per week, on Thursdays (the nurses' payday). *Ibid.*

The literature distributed by the nurses to their coworkers consisted of compilations of articles from nursing journals, newspapers, and magazines. Pet. App. A20, B2. The articles addressed such issues as the use of nonprofessional employees by hospitals to provide patient care formerly administered by registered nurses. *Ibid.* The articles bore headlines such as "A shortcut that killed a patient." *Id.* at A20-A21. None of the articles referred to petitioner but rather addressed occurrences at other hospitals. *Ibid.*; *id.* at B3. On multiple occasions, petitioner ordered the nurses to stop distributing the literature. *Id.* at A20, B3.

3. Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by prohibiting its employees from distributing literature at the hospital. Pet. App. A15-A16.

a. After a hearing, an administrative law judge (ALJ) sustained that allegation. Pet. App. A23-A29, A41. The ALJ concluded that petitioner's ban on the nurses' distribution of literature in the vestibule at the front entrance, outside the rear entrance, and outside the emergency/outpatient entrance was not presumptively lawful, because none of those locations is reasonably characterized as an "immediate patient care area" or a work area. *Id.* at A28-A29.

The ALJ also rejected petitioner's contention that it was nonetheless justified in prohibiting the nurses' distribution of literature because of the potential effect on the delivery of health care. Pet. App. A21-A23. In support of its proffered justification, petitioner presented the testimony of two staff physicians and a former nurse, who stated that, if patients or their families saw the literature distributed by the nurses, they "could become upset and anxious and it could undermine the trust that should exist between a patient and the medical staff treating the patient." *Id.* at A21. The ALJ found that concern insufficient to justify banning distribution of the literature because "there was not a shred of evidence that any patient or family member saw any of th[e] literature." *Id.* at A22. The ALJ found that petitioner had received "no complaints about the literature from any patient or family member of a patient" (*id.* at A22-A23) and that there was "no evidence that any patient was ever disturbed or inconvenienced by the distribution of th[e] literature" (*id.* at A23).

b. The Board, with one member dissenting, affirmed the ALJ's decision. Pet. App. A1, A46 n.5. The Board further found that petitioner's policy banning employee solicitation and literature distribution was unlawful insofar as it prohibited distribution of literature or solicitation in all "halls and corridors used by patients." *Id.* at A4. The Board explained that those locations are not all necessarily immediate patient care areas (where both distribution and solicitation may presumptively be banned) or work areas (where distribution may presumptively be banned). *Ibid.*; *id.* at A46-A47 n.11.

The Board declined to abandon "well-established precedent" in favor of a new rule proposed by the dissenting Board member, under which a hospital's ban on distribution of literature and solicitation "in areas where patients, their families, and visitors spend a substantial amount of time" would be presumed lawful. Pet. App. A4-A6; see *id.* at A8-A9 (Member Hurtgen, dissenting in part). Although the Board agreed with the dissenting Board member that "an 'atmosphere of serenity' is a desirable goal in the hospital setting," the Board majority could find "no support in the record of this case for departing from" settled law. *Id.* at A5-A6.

To remedy petitioner's unfair labor practices, the Board ordered petitioner to cease and desist from "[r]efusing to permit employees to distribute literature concerning terms and conditions of employment to other employees in nonworking, nonpatient care areas of the hospital." Pet. App. A42; see *id.* at A7. The Board also ordered petitioner to rescind the unlawful portion of its policy prohibiting employee solicitation and literature distribution. *Id.* at A8.

4. The court of appeals enforced the Board's order in relevant part. Pet. App. B2, B13. The court rejected petitioner's "primary contention" that "prohibiting

distribution in the vestibule was necessary to avoid disturbing patients." *Id.* at B4. Although the court agreed with petitioner that it "had to show only a likelihood of, not actual, disruption or disturbance," the court found that "substantial evidence supports the Board's decision that [petitioner] did not meet even this standard." *Id.* at B5-B6. The court explained that, although "[petitioner's] experts testified that if patients saw or heard about the content of the literature they would be upset," petitioner "presented no reason * * * to believe patients were likely to learn of the content of the literature." *Id.* at B6.

The court of appeals also rejected petitioner's argument that the vestibule is a work area, and thus that petitioner was presumptively entitled to prohibit the distribution of literature there. Pet. App. B7. Rather, the court concluded that, under settled Board precedent, petitioner's vestibule is not a work area merely because "employees assist discharged patients through the vestibule, janitors clean the area, and a guard is sometimes stationed there." *Ibid.*

The court of appeals further rejected petitioner's claim that the literature disparaged petitioner's services and that its distribution was therefore unprotected under the reasoning of *NLRB* v. *Local Union No. 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953). Pet. App. B8. The court of appeals explained that *Jefferson Standard* is inapposite, and no concern of disparagement was presented by the nurses' activities, because the literature did not refer to petitioner and was not distributed to the public. *Id.* at B8-B9.

Finally, the court of appeals rejected petitioner's contention that the Board was required to adopt a new presumption permitting hospitals to prohibit solicitation and distribution in any area "to which patients,

their families and visitors have regular access." Pet. App. B9. The court explained that the Board "clearly did appreciate its continuing duty to keep current its approach to distribution and solicitation in hospitals." *Ibid.* The court found that, after discharging that duty, the Board "simply found 'no support in the record for departing from * * * well-settled principles.'" *Ibid.* (quoting Pet. App. A5).

## ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. Petitioner incorrectly contends (Pet. 12-16) that the Board was obligated in this case to abandon its long-standing approach to employee solicitation and literature distribution in health care facilities and to adopt instead a rule under which employers would presumptively have authority to prohibit distribution and solicitation "in all areas of a hospital's premises to which patients and their families or friends have regular access." Pet. 15. As the court of appeals held, petitioner presented no reason for the Board to revise its current approach, which this Court has previously approved. See Pet. App. B9.

a. This Court has explained that, "as in many other contexts of labor policy," the "ultimate problem" facing the Board, when exercising its authority "to fashion generalized rules in light of its experience * * * involving hospitals," is "the balancing of the conflicting legitimate interests." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500-501, 507 (1978) (internal quotation marks omitted). As discussed above, the Court has upheld the Board's current approach to solicitation and distribu-

tion, under which a health care facility is presumptively entitled to prohibit solicitation and distribution in "immediate patient care areas" and to prohibit distribution in work areas. See p. 2, *supra*.

The Court has also explained that, in striking the appropriate balance among competing interests, the Board bears "a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals." *Beth Israel Hosp.*, 437 U.S. at 508 (internal quotation marks omitted). Accordingly, the Court has indicated that the Board "should stand ready to revise its rulings if future experience demonstrates that *the well-being of patients is in fact jeopardized.*" *Ibid.* (internal quotation marks omitted) (emphasis added). Nonetheless, in the health-care field, as in other labor contexts, "[t]he function of striking th[e] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review." *Id.* at 501 (quoting *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96 (1957)).

Here, as the court of appeals correctly concluded (Pet. App. B9), the Board, heeding this Court's admonition, "clearly did appreciate its continuing duty to keep current its approach to distribution and solicitation in hospitals." However, petitioner failed to provide evidence to the Board demonstrating that "the well-being of patients is in fact jeopardized" by the Board's current approach. *Beth Israel Hosp.*, 437 U.S. at 508. The Board was therefore justified in declining to revise extant law in this case. See Pet. App. A5-A6, B9.

b. Before the Board, petitioner's expert witnesses testified only that "if patients or their families saw [the distributed] articles they could become upset and

anxious." Pet. App. A21, B5. However, as the court of appeals found (*id.* at B5-B6), substantial evidence in the record supports the Board's determination that this testimony does not demonstrate "a likelihood of * * * disruption or disturbance," because petitioner came forward with "no reason * * * to believe patients were likely to learn of the contents of the literature." Given that evidentiary record, the Board was not required in this case to hold that its current rules "jeopardize[]" patient well-being (*Beth Israel Hosp.*, 437 U.S. at 508), much less to adopt the dramatic shift in approach proposed by petitioner.

Petitioner incorrectly asserts (Pet. 6-11) that its proposed rule is necessary because the record expert testimony and certain "other available data" (Pet. 7-8) demonstrate that "the population admitted to acute care community hospitals in this day and age is much more acutely ill, and is allowed fewer days of in-patient treatment which naturally results in discharged patients being sicker when discharged." Pet. 11. Even if we assume those facts to be correct, they do not require the Board to abandon its current approach. Under current law, a hospital can prohibit solicitation and distribution in any area of the facility if the hospital has reason to believe that such activity is likely adversely to affect patient well-being. See *Beth Israel Hosp.*, 437 U.S. at 500, 507; *Baptist Hosp.*, 442 U.S. at 781 n.11.

Petitioner also errs in contending (Pet. 14-15) that its proposed broad presumption is necessary because the Board's interpretation of what constitutes an "immediate patient care area" has remained "remarkably static" and fails to recognize that "[p]atient care is a much broader concept than discreet [*sic*] medical procedures or treatments." When the Board first began regulating union activity in private hospitals, the Board

limited the concept of "immediate patient care areas"—where solicitation and distribution may presumptively be prohibited—to patients' rooms, operating rooms, and treatment rooms. See *Baptist Hosp.*, 442 U.S. at 781 n.10. Subsequently, however, the Board, based on "further experience with hospital no-solicitation rules," has extended the concept (and the attendant presumption) to "halls and corridors adjacent to" those areas. *Intercommunity Hosp.*, 255 N.L.R.B. 468, 472 (1981); see *Doctors' Hosp. of Staten Island, Inc.*, 325 N.L.R.B. 730, 735 (1998) (waiting rooms adjacent to immediate patient care areas). Moreover, in other locations where the presumption does not apply, the Board has readily allowed hospitals to justify prohibitions on solicitation. See, *e.g.*, *Presbyterian/St. Luke's Med. Ctr.*, 258 N.L.R.B. 93, 98 (1981) (hallways, elevators, and stairways "utilized for the movement of patients and emergency equipment"), enforced, 723 F.2d 1468 (10th Cir. 1983). In light of the Board's decisions, petitioner is unpersuasive in contending that patient well-being can be protected only by a broad rule presumptively allowing hospitals to ban solicitation and distribution wherever "patients and their families or friends have regular access." Pet. 15.

2. Petitioner also errs in contending (Pet. 16-17) that the court of appeals' decision required petitioner to demonstrate "actual harm" (Pet. 16) to patients in order to justify a ban on literature distribution and that the decision is therefore inconsistent with *Baptist Hospital.* On the contrary, the court of appeals expressly stated that petitioner "had to show only a likelihood of, not actual, disruption or disturbance." Pet. App. B5. That test fully accords with this Court's precedent. See *Baptist Hosp.*, 442 U.S. at 781 n.11 (relevant inquiry is whether solicitation is "likely" to disrupt patient care or

disturb patients); *Beth Israel Hosp.*, 437 U.S. at 500 (relevant inquiry is whether patient care is "likely" to be disrupted).

3. Finally, petitioner is also mistaken in contending (Pet. 18-22) that it was free to prohibit its nurses from distributing the literature at issue because the literature was not protected by Section 7 of the Act. Section 7 guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. 157. Employers and unions are obligated to bargain in good faith "with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. 158(d). Here, the Board reasonably concluded that "the literature distributed at Brockton Hospital concerned terms and conditions of employment" and was "encompass-[ed]" by the "mutual aid or protection" clause of Section 7. Pet. App. A24-A25.

As the Board found, the literature was distributed for the purpose of "educat[ing] the nurses in the [bargaining] unit about trends in the nursing field and also to prepare the nurses for the upcoming negotiations for a new contract later in the year." Pet. App. A18; see *id.* at A19-A20. The Union believed that issues such as staffing shortages, mandatory overtime, and the use of nonprofessional staff to perform work traditionally done by nurses "would be brought up at upcoming bargaining sessions for a new collective-bargaining agreement" with petitioner. *Id.* at A18. The distributed literature addressed precisely those issues, which are "matters of working conditions critical in importance to nurses." *Id.* at A25; see *id.* at A20.

There is no merit to petitioner's contention (Pet. 19-21) that the literature was unprotected "disparagement" of its services under *NLRB* v. *Local Union No.*

*1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953). In *Jefferson Standard*, this Court concluded, in agreement with the Board, that employees had engaged in unprotected conduct when, during an impasse in negotiations, they "sponsored or distributed 5,000 handbills making a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *Id.* at 471.

As the court of appeals correctly concluded (Pet. App. B8-B9), *Jefferson Standard* is inapposite. The articles distributed by the nurses here did not disparage petitioner's services but rather addressed mishaps at *other* hospitals. *Id.* at B8. Moreover, to the extent that the articles could be understood to imply that similar problems might occur if petitioner downsized its nursing staff, such an inference could not have been drawn by the general public, because the articles were distributed only to nurses in the bargaining unit. *Id.* at B8-B9. In those circumstances, the court of appeals properly concluded that "the concern underlying *Jefferson Standard*, that activity 'reasonably calculated to harm the company's reputation and reduce its income' rather than further collective bargaining be excluded from the protection of the Act, simply is not present." *Id.* at B9 (citation omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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